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COMMENTS ON RECENT DECISIONS.

A METHOD BY WHICH THE STATES MAY NOW TAX INTERSTATE COMMERCE.

The Supreme Court is making rapid progress in its recently assumed task of re-establishing the repudiated right of the States to tax interstate commerce. The doctrine enunciated in Maine *v.* Grand Trunk Railway,[1] to which attention was called in the March number of this periodical, and which was considered as making a radical departure from hitherto well-recognized principles, has been reiterated and carried to still greater lengths in the case of Ficklen *v.* The Shelby Taxing District,[2] a statement of which will be found among the cases abstracted.

In order to appreciate into what new fields the doctrine above referred to is leading the Court, we need only compare this last case with that of Robbins *v.* District.[3] In the Robbins case a tax of $10 a week upon all persons selling goods by sample and not having a licensed house of business within the district was held void as to a citizen of Cincinnati, "drumming" for a Cincinnati firm. In the case at bar the difference was this: The business was of precisely the same character, but the drummers had permanently located within the district, and, for aught that appears in the report, were presumably citizens of Tennessee. The case was also complicated by the fact that the drummers had taken out, and paid $50 for, a license to do a *general commission business*, and, as one of the conditions of obtaining such a license, they had given bond to report their gross commissions, charges or compensation during the year, and to pay a tax of 2½ per cent. on the same. The Court considered this one of the grounds of their decision, and held that the drummers had voluntarily subjected themselves to the tax. And the Chief-Justice is very careful to say, at the close of the opinion, that "what position they would have occupied had they not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise on this record."

Nevertheless, we believe it follows as a necessary corollary from this decision, that the State may tax in this way the gross receipts of a resident drummer whose business is exclusively interstate. For if it cannot tax those receipts so long as he does no local business, how does it acquire the right to tax them where he extends his activity to business within the State? A State may tax its own internal commerce, but that does not give it any right to tax interstate commerce. For example, in Selouf *v.* Mobile,[4] where it was held that the State could not require a telegraph company to take out a license before setting up an office within the State, it was urged that a portion of the company's business

[1] 147 U. S., 18.
[2] Not yet reported.
[3] 120 U. S., 489.
[4] 127 U. S., 640.

was internal to the State, and therefore taxable; but Mr. Justice BRADLEY said: "But that fact does not remove the difficulty. The tax affects the whole business, without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Consequently, in the case at bar, if the percentage tax had been considered a tax upon interstate commerce, it would have been declared void as far as the interstate business was concerned. The Court was, therefore, under the necessity of holding that it was not a tax upon interstate commerce, and did, in fact, so decide, as witness the following extract from the opinion: "The tax is not on the goods or on the proceeds, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way, it is incidentally and so remotely as not to amount to a regulation of such commerce." The Court finds authority for this proposition in the doctrine before referred to, which first made its appearance in Home Insurance Co. *v.* N. Y.,[1] and was first made use of in interstate commerce questions in the Grand Trunk case[2] above referred to, and which may be stated as follows: "So long as the subject upon which the tax is *in terms* laid on something which the State may tax, such as the property, trade or occupation of the citizen, then the tax will be valid, although the subject which forms the measure of the amount of the tax—in other words, that upon which the tax is graded—is something which the State could not tax directly." This doctrine is, indeed, not new; but whereas it is now treated as an axiom of constitutional jurisprudence, it was formerly considered in its true light, namely, as a mere subterfuge, an impotent attempt on the part of the State to close the eyes of the Court to the real nature of the tax.

As to the bond which the drummers gave in this case, the correct view would seem to be that of Mr. Justice HARLAN, that it should not be construed as embracing earnings in a business which the State could not constitutionally tax. And it should be remembered that it was only upon condition of giving such a bond that the drummers were allowed to do internal business, and that no one engaging in interstate commerce could do such business without consenting to be taxed for all his interstate business. This would seem to be a clear burden upon interstate commerce, and if the State could not impose such a tax the condition of the bond is void. Says Mr. Justice BLATCHFORD, in Barrow *v.* Burnside:[3] "In all cases in which this Court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States."

How far the Supreme Court will carry the novel and, we believe, disastrous doctrine above referred to it is impossible to say, but from present indications it would seem that they are prepared to carry it very far. That its results will be most far-reaching, a very little consideration will

[1] 134 U. S., 594. [2] 142 U. S., 117. [3] 121 U. S., 186.

show, for it evinces a disposition on the part of the Court to look solely to the letter of State laws, and to disregard both spirit and practical effect, so that many State tax laws, which have hitherto been declared void, may now, by a few judicious changes in the terms and phrases used, be put into full force and effect, although their practical operation is in no wise altered. Thus has the Court made a fatal breach in that strong bulwark of decisions by which all the efforts of the States to attack interstate commerce have, up to this time, been successfully resisted, and thus it has opened a wide door for the evasion of those wise principles which the former members of the Court laid down for the protection of the commercial interests of the country. There is much food for reflection in the thought suggested by the decisions of the Court for the last year, namely, how great a revolution of doctrine may result from a few changes in *personnel*.

FRANCIS COPE HARTSHORNE.

ABSTRACTS OF RECENT CASES.

Selected from the current of American and English Decisions.

BY

WILLIAM WHARTON SMITH, HORACE L. CHEYNEY,
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BANKING—CERTIFICATE OF DEPOSIT ISSUED BEFORE INCORPORATION.—A bank is not liable, even to an innocent holder, for value, on a certificate of deposit issued before its organization or incorporation, and signed as cashier by the person who afterwards became such, there being nothing to show that the bank ever received any consideration therefor: Long *v.* Citizens' Bank, Supreme Court of Utah, April 1, 1892, BLACKBURN, J. (29 Pacific Reporter, 878).—*J. A. McC.*

CARRIERS OF FREIGHT—DISCRIMINATION—COMMON LAW LIABILITY.—The complainant in this case alleged that the defendant company—a common carrier—charged the complainant 12½ per cent. more than it did other merchants; that said charges were a discrimination against the plaintiff, and though often requested so to do, defendant refused to allow complainant the reduced rates. The facts of this case, for other reasons, not coming within the revised statutes of the State, the question was whether at common law the complainant would have had a right of action. It was held: That while at common law an action would lie for an unreasonable and excessive freight charge, yet there was nothing to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. The fact that one person is charged more than another is only evidence of a discrimination: Cowden *v.* Pacific Coast S. S. Co., Supreme Court of California, May 6, 1892 (GARVUTTE, J.).—*J. A. McC.*